

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

~~11-1075~~
~~77-7100~~

United States Court of Appeals

FOR THE SECOND CIRCUIT

Esso NEDERLAND B.V.,

*Plaintiff-Appellee,
Cross-Appellant,*

against

M.T. TRADE FORTITUDE, her engines, boilers, etc.
and MARASTRO COMPANIA NAVIERA, S.A.,

*Defendants-Appellants,
Cross-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE,
CROSS-APPELLANT

KIRLIN, CAMPBELL & KEATING
*Attorneys for Plaintiff-Appellee,
Cross-Appellant Esso Nederland b.v.*
120 Broadway
New York, New York 10005

David A. Nourse
Armand Maurice Paré, Jr.
Of Counsel

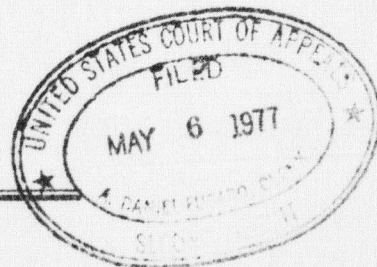


TABLE OF CONTENTS

Issues Presented by the Carrier's Appeal	1
Issues Presented by the Consignee's Cross-Appeal	1
Statement of the Case	2
Statement of the Relevant Facts	3
POINT I	13
THE FINDING OF THE DISTRICT COURT THAT THE CARRIER HAD MADE A SHORT DELIVERY OF 516 L/T OF CRUDE OIL WAS NOT "CLEARLY ERRONEOUS"	
POINT II	21
THE DISTRICT COURT DID NOT ERR IN REJECTING CARRIER'S CONTENTIONS CONCERNING THE ASSERTED "CUSTOM" IN THE TRADE FOR A CARRIER TO BE GIVEN A 0.5% ALLOWANCE FOR LOSS OF CARGO IN TRANSIT	
POINT III	30
THE DISTRICT COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE EXTENT OF THE CARGO SHORTAGE COULD NOT BE CALCULATED BY USE OF SHORE TANK MEASUREMENTS TAKEN UPON COMPLETION OF DISCHARGE	
POINT IV	37
THE DISTRICT COURT ERRED, IN ITS DETERMINATION OF DAMAGES, IN FAILING TO INCLUDE AS AN ELEMENT OF DAMAGES THE COST OF TRANSPORTING A REPLACE- MENT CARGO TO THE PORT OF DISCHARGE	
POINT V	41
THE DISTRICT COURT ERRED, IN ITS DETERMINATION OF DAMAGES, IN PRESUMING, IN THE ABSENCE OF ANY EVIDENCE, THAT THE ACTUAL PRICE PAID BY CONSIGNEE TO ITS AFFILIATE FOR THE CRUDE OIL WAS AN UNRELIABLE MEASURE OF ITS ACTUAL VALUE	
FINAL POINT	46

Table of Authorities

Cases	Page
<u>Anglo-Saxon Petroleum Co. v. United States</u> 222 F.2d 75 (2d Cir. 1955)	24
<u>Calmar S.S. Corp. v. Scott</u> 197 F.2d 795, 798 (2d Cir. 1952)	40
<u>Cargo Carriers Inc. v. Erie & St. Lawrence Corp.</u> 105 F. Supp. 638, 639 (WDNY 1952)	26
<u>Centerchem Products v. A/S Rederi Odfjell</u> 1972 AMC 373 (EDVa. 1971)	34
<u>Continental Oil Co. v. United States</u> 184 F.2d 802, 813 (9th Cir. 1950)	40
<u>Diaz v. United States</u> 223 U.S. 442, 450 (1912)	40
<u>Fianza Cia Nav. S.A. v. Benz</u> 178 F. Supp. 243, 246 (DCOr. 1958)	45
<u>Flax v. Prudential Life Ins. Co.</u> 148 F. Supp. 720, 730 (SDCal. 1957)	45
<u>Freedman v. The M/S Concordia Star</u> 250 F.2d 867, 869 (2d Cir. 1958)	19
<u>General Motors Corp. v. Pennsylvania R.R. Co.</u> 357 F. Supp. 646, 653 (SDNY 1973)	24
<u>Graham v. Acme Markets, Inc.</u> 299 F. Supp. 1304 (EDPa. 1969)	26
<u>Illinois Central R. Co. v. Crail</u> 281 U.S. 57 (1930)	41
<u>Interstate Steel Corp. v. SS Crystal Gem</u> 317 F. Supp. 112, 116 (SDNY 1970)	33
<u>McAllister v. United States</u> 348 U.S. 19, 20 (1954)	14

Cont'd

Cases	Page
<u>M.W. Zack Metal Co. v. SS Birmingham City</u> 311 F.2d 334, 337-338 (2d Cir. 1962)	14
<u>Northern Commercial Co. v. Lindblom</u> 162 F. 250 (9th Cir. 1908)	39
<u>Parkway Baking Co. v. Freihoffer Baking Co.</u> 255 F. 2d 641, 647 (3d Cir. 1958)	24
<u>Schindley v. Allen-Shermanhoff Co.</u> 157 F. 2d 102, 104 (6th Cir. 1946)	43
<u>Skidmore v. Swift & Co.</u> 323 U.S. 134 (1944)	27
<u>Socony-Vacuum Oil Co. v. Oil City Refiners, Inc.</u> 136 F.2d 470, 474 (6th Cir.1943) cert. denied 320 U.S. 798 (1943)	44
<u>Sonken-Galamba Corp. v. Thompson</u> 225 F.2d 608 (10th Cir.) cert. denied 350 U.S. 896 (1955)	27
<u>St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial do Rio de Janeiro</u> 263 U.S. 119 (1923)	38
<u>Swedish American Line v. Evans Products Co.</u> 431 F.2d 869 (4th Cir. 1970)	33
<u>The Arctic Bird</u> 109 F. 167, 175 (NDCal. 1901)	39
<u>The Hugo</u> 61 F. 860 (SDNY 1894)	39
<u>United States v. Aluminum Co. of America</u> 148 F.2d 416, 433 (2d Cir. 1945)	15
<u>United States v. Kansas Gas & Electric Co.</u> 215 F. Supp. 532, 542 (DCKan. 1963)	45
<u>United States v. One 1971 Ford Truck</u> 346 F. Supp. 613, 620 (CDCal. 1972)	45
<u>United States v. United States Gypsum Co.</u> 333 U.S. 364, 394-395 (1948)	13,15

Cont'd

Cases	Page
<u>United States v. Washington</u> 233 F. 2d 811, 816 (9th Cir. 1956)	45
<u>Venesta, Ltd. v. Walford Lines, Ltd.</u> [1922] 12 Lloyd's List L.R. 139	18
<u>Waters v. National Life & Accident Ins. Co.</u> 156 F.2d 470, 472-473 (10th Cir.1946)	43
<u>Western & Atlantic R.R. v. Henderson</u> 279 U.S. 639 (1929)	44
<u>Wilkins v. American Export Isbrandtsen Lines,</u> <u>Inc.,</u> 446 F. 2d 480, 484 (2d Cir. 1971) <u>cert. denied</u> 404 U.S. 1018 <u>rehearing denied</u> 405 U.S. 969 (1972)	44

Statutes

Carriage of Goods by Sea Act, 1936 46 USCA §1301 <u>et seq.</u>	20, 29
Federal Rules of Civil Procedure Rule 52(a)	13

Other Authorities

1 Carver, <u>Carriage by Sea</u> , (12 ed. 1971) . . .	19, 22, 23, 24, 28
2 Carver, <u>Carriage by Sea</u> , (12 ed. 1971) . . .	33, 39
Gilmore & Black, <u>Admiralty</u> (2d ed 1975) . . .	28, 38
Knauth, <u>Ocean Bills of Lading</u> (1953) . . .	33
Longley, <u>Common Carriage of Cargo</u> (1967) . . .	39

ISSUES PRESENTED BY THE CARRIER'S APPEAL

1. Whether the finding of the District Court that the Carrier had made a short delivery of 516 long tons of a cargo of crude oil was "clearly erroneous".
2. Whether the District Court erred in rejecting the Carrier's contention that the law should honor and incorporate an asserted "custom" in the trade for a carrier to be given a 0.5% allowance for loss of cargo in transit.

ISSUES PRESENTED BY THE CONSIGNEE'S CROSS-APPEAL

1. Whether the District Court erred in holding as a matter of law that the extent of a shortage of a cargo of crude oil carried by sea cannot be calculated by use of measurements of the cargo taken in shore tanks after the cargo has been discharged from the carrying vessel where such measurements are proved to accurately reflect the quantity discharged from the vessel.
2. Whether the District Court erred, in its determination of damages, in failing to include as an element of damages the cost of transporting a replacement cargo to the port of discharge.
3. Whether the District Court erred, in its determination of damages, in presuming, in the absence of any evidence, that the price charged by one corporate affiliate to another for a cargo of crude oil was a less reliable measurement of its actual value than the price charged for the cargo in a prior transaction with a non affiliate.

Statement of the Case

Defendants M.T. TRADE FORTITUDE ("Vessel") and Marastro Compania Naviera, S.A. ("Carrier") appeal from a final judgment of the District Court for the Southern District of New York dated January 26, 1977 (App. 11)* awarding damages in the amount of \$36,725.44 together with interest to plaintiff Esso Nederland b.v. ("Consignee") after a trial before Honorable Marvin E. Frankel without a jury on Consignee's admiralty and maritime cause of action for cargo shortage.

Consignee cross appeals from the judgment to the extent that the amount of damages is inadequate insofar as it is based on erroneous conclusions of law with respect to the measurement and value of the cargo loss and is inadequate insofar as it fails to allow Consignee a recovery for the cost of transporting a replacement cargo to the port of discharge.

*References to pages in the Joint Appendix will be indicated by "App." while references to the pages in the Joint Appendix (Exhibits) will be indicated by "App. Ex".

Statement of the Relevant Facts

Consignee, a Netherlands corporation, brought its admiralty and maritime action in the District Court below for damages for short delivery of a portion of a cargo of Nigerian crude oil loaded on the Vessel at Bonny, Nigeria for carriage to Rotterdam pursuant to the terms and conditions of an ocean bill of lading (App.Ex.15) signed by the Vessel's master and binding on Carrier. Carrier admitted prior to trial that the quantities of crude oil shown on the bill of lading, expressed both in long tons and U.S. barrels at 60°F, had been delivered to the Vessel at Bonny. (App. 12-13) The principal factual issue for the court below was thus what quantity of crude oil was delivered by the Vessel at Rotterdam. (App. 50)

Testimony at the trial by Consignee's expert witness, Mr. Mullin, a petroleum inspector with 31 years' experience, (App.34-35, 42-44) confirmed that in the petroleum industry quantities of crude oil were expressed in weights, in long tons, and such weights were determined from measurement of the volume of the crude oil in either shore tanks or vessel tanks. (App. 34-36, 46-50) Standards for such measurements were set by organizations such as the American Petroleum Institute ("API"), the American Society for Testing Materials

("ASTM") and the International Standard Organization ("ISO"). (App. 37, 43-44)

In making a measurement of crude oil in either a shore tank or a vessel's tank the procedure was to take an ullage of the tank, that is, a measurement of the distance of the liquid level below the top of the tank, (App. 38, 46) and then determine the gross volume of the crude oil in the tank, in U.S. barrels, by reference to a tank calibration table. (App. 38-39) As the temperature of the crude oil affected its volume, an adjustment of the gross volume was then made to obtain gross volume in U.S. barrels at 60°F. (App. 46, 56) Next, a determination was made of the amount of suspended water and sediment in the tank, called "basic sediment and water" or "BS&W" in order to convert gross barrels to net barrels, that is, the amount of "dry oil" in the tank. (App. 48). Also the amount of "free water" in the tank (App. 72-73) would be determined by a process called "water thieving" and a deduction made for such free water. (App. 67-69) Both gross and net quantities were then converted to long tons, using ASTM tables. (App. 67) (see generally App. 45-50, 63-87)

As the vessel's tanks were normally empty prior to commencement of loading, the tank ullage after loading was

completed indicated the quantity loaded in the tank. However, if the vessel's tank contained "slops", a mixture of cargo residue and tank washing water, (App. 59-62) the quantity of slops had to be deducted to determine the quantity of crude oil loaded. With respect to shore tanks, the quantity transferred either out of the shore tank into the vessel or out of the vessel into the shore tank was determined from a comparison of ullages of the shore tank before and after the particular operation. (App. 79)

In the present case the Vessel loaded Nigerian Light Crude Oil ("Light Crude") in its five center tanks (App. Ex. 23) and Nigerian Medium Crude Oil ("Medium Crude") in its port and starboard wing tanks Nos. 1, 3, 4 and 5. (App. Ex. 30) (No. 2 port and starboard wing tanks were left empty -- App. 58). The quantities of Light Crude and Medium Crude loaded on the Vessel were calculated on the basis of shore tank measurements made before and after loading and the details of these calculations were set out on two certificates of quantity (App. Ex. 13, 14) issued by BP Trading Limited, the seller of the oil. Mr. Mullin testified that he had reviewed these calculations and that the calculations were without errors and were made in accordance with the usual procedures customary in the petroleum industry. (App. 47). As was customary, the bill of lading (App. Ex. 15) which was issued by the Vessel's master for the two types of crude oil was made up from the

certificates of quantity. (App. 49).

The quantities of crude oil shown in the certificates of quantity and the bill of lading (and which Carrier admitted were delivered to the Vessel at Bonny - App. 12-13) were as follows:

Light Crude:

gross*: 33,278 long tons (253,490 U.S. bbls. at 60°F)
net**: 33,179 long tons (252,856 U.S. bbls. at 60°F)

Medium Crude:

gross: 27,726 long tons (197,337 U.S. bbls. at 60°F)
net: 27,690 long tons (197,112 U.S. bbls. at 60°F)

Total long tons:

gross: 61,004 L/T
net: 60,869 L/T

Prior to the Vessel's departure from Bonny, ullages of the Vessel's tanks were taken and a report of the ullages, signed by the Vessel's chief officer, was prepared. (App. Ex. 18). This ullage report indicated that the Vessel had 200 tons of slops in the starboard No. 5 wing tank before loading. (App. Ex. 18). The gross quantities of crude oil, based on the Vessel's ullages and stated in the ullage report, were as follows:

Light Crude:

gross: 33,797 long tons

* Without allowance for suspended BS&W

** "Dry oil" (App. 48)

Medium Crude:

gross: 27,687 long tons

Total long tons:

gross:* 61,484 L/T

The Vessel's master subsequently advised by radio message that the 200 tons of slops had been excluded in determining these gross tonnages (App. Ex. 41, 42; App. 22).

As can be seen from a comparison of the gross tonnages shown on the certificates of quantity and the bill of lading (App. Ex. 13, 14, 15) with those shown in the Vessel's ullage report, (App. Ex. 18) there was a difference of 480 L/T, with the Vessel's ullages indicating that a greater quantity of crude oil had been delivered to the Vessel than Carrier admitted had been delivered. The District Court below found this "persuasive evidence that the Trade Fortitude's tanks were not accurately calibrated and that all ship-to-shore comparisons were tainted by the inaccuracy." (App. 7)

The voyage from Bonny to Rotterdam took from January 22, 1974 to February 7, 1974, a period of about 17 days (App. Ex. 13, 21). Ullages of the Vessel's tanks were taken at Rotterdam before discharging started and a report, signed by the Vessel's chief officer, was prepared. (App. Ex. 19). A comparison of these Rotterdam ullages with the Bonny ullages indicated that there had been decreases in the volumes of

*Vessels do not generally have the necessary equipment for determining BS & W (see App. 48, 73-74) and therefore can measure only gross quantities.

crude oil in the Vessel's tanks during the voyage. Mr. Mullin testified that the decreases in volumes indicated that crude oil had been transferred between tanks during the voyage. (App. 51-53). He also testified that the decreases in volumes were greater than the decreases which were expectable because of the cooling of the crude oil during the voyage from Bonny to Rotterdam. (App. 56 - 59) No evidence from the Vessel concerning the voyage or explaining the decreases in volumes of the crude oil was produced by the Carrier.

The gross quantities of crude oil, based on the Vessel's Rotterdam ullages and stated in the ullage report at Rotterdam, (App. Ex. 19) were as follows:

Light Crude:

gross: 33,690 L/T

Medium Crude:

gross: 27,278 L/T

Total long tons

gross: 60,968 L/T*

This was 516 gross L/T less crude oil than the total quantity of 61,484 gross L/T determined on the basis of the Vessel's Bonny ullages, (App. Ex. 18) indicating that a shortage had

*The 200 L/T of slops and a measured quantity of free water were excluded from the totals on the ullage report. (App. 70-72).

occurred during the voyage. (App. 5).

A survey of the unloading and storage operations at Rotterdam was performed by Chemical Laboratory Dr. A. Verwey ("Verwey") (App. 15) and a report of the survey was made. (App. Ex. 20-38). The report contained various calculations concerning the quantities of cargo both on board the Vessel prior to discharging and in the shore tanks after completion of discharging, made by Mr. Jakob Van Krimpen, Senior Inspector of the Verwey laboratory, (App. 14-15) whose deposition on written interrogatories and cross interrogatories was received in evidence at the trial. (App. 14-20; App. 71-72). Mr. Mullin testified that the procedures used and the calculations made at Rotterdam were correct and in accordance with the practice in the petroleum industry. (App. 63).

The Verwey report (App. Ex. 28, 35) concluded that the following net quantities had been discharged from the Vessel at Rotterdam:

Light Crude:

Net: 33,311.98 L/T (253,647.46 U.S. bbls. at 60°F)*

Medium Crude:

Net: 26,946.84 L/T (192,009.65 U.S. bbls. at 60°F)

Total long tons:

Net: 60,258.82 L/T

*See App. 17

This was 610.18 L/T less than shown on the bill of lading. (App. Ex. 15). However as the 200 L/T of slops were discharged into the shore tanks along with the crude oil, (App. Ex. 43) thus displacing 200 L/T of oil, the total shortage was 810.18 L/T, the quantity for which Consignee brought its suit.

Mr. Van Krimpen stated in his deposition (App. 19) that the piping arrangement by which the crude oil was transferred from the Vessel to the shore tanks had been inspected as part of the survey, that no defects which may have caused leakage were discovered and that no leakages were ascertained. He also was not aware of any reports of leakages during the cargo transfer. Further, the shore lines were airvented both before and after discharge and were considered full of oil. (App. 19).

For purposes of comparison Mr. Van Krimpen, using the ullage figures contained in the Vessel's Rotterdam ullage report, (App. Ex. 19) also calculated the quantities of Light Crude and Medium Crude on board the Vessel prior to discharging as being 33,642.45 gross L/T of Light Crude and 27,476.80 gross L/T of Medium Crude or a total of 61,119.25 gross L/T. (App. Ex. 24, 31). However Mr. Van Krimpen did not exclude the 200 L/T of slops from his calculations. (App. Ex. 31). Thus the gross tonnages stated on both the Vessel's ullage report (60,968) and the Verwey report (61,119.25-200 = 60,919.25) were nearly the same. (App. 5).

Consignee purchased the crude oil loaded on the Vessel at Bonny pursuant to an Agreement for Supply of Crude Oils ("Supply Agreement") (App. Ex. 1-12) with its affiliate Esso International Inc. ("EIC"). Pursuant to Section 3 of Appendix II of the Supply Agreement Consignee was obligated to pay "FOB tank vessel at the loading port". (App. Ex. 7). Consignee paid EIC at the rate of \$10.658 per U.S. barrel for the Light Crude and \$10.321 per U.S. barrel for the Medium Crude. (App. Ex. 17; App. 30). EIC had purchased the cargo from BP Trading Limited at the rate of \$9.14 per U.S. barrel for the Light Crude and \$10.09 per U.S. barrel for the Medium Crude (App. 101, 126).

The Vessel, at the time it loaded the cargo at Bonny, was performing under a time charter between Carrier, as owner, and Standard Tankers (Bahamas) Company Ltd. ("STB") as charterer. The transportation of the cargo of crude oil from Bonny to Rotterdam was pursuant to an Inter-Affiliate Blanket Charter Agreement ("Agreement") between STB and Consignee's subsidiary, Esso Tankvaart Maatschappij N.V. (App. Ex. 47 - 61). The Agreement provided that freight was computed on the basis of "intake quantity" and payment of freight was to be made "without discount". (App. Ex. 59). The freight for the cargo of crude oil was at the rate of

\$9.428 per long ton of cargo, (App. Ex. 39) as determined by multiplication of \$4.75 (the base or scale Worldscale ("WS") freight for the voyage per long ton, equivalent to WS 100) by the applicable WS rate of 198.5. (App. Ex. 46).

The District Court below held that Consignee had established a shortage of crude oil in the amount of 516 L/T (App. 5, 6) and that Carrier had not satisfactorily explained the shortage or proved its asserted defenses of release and "custom" of the trade permitting it an allowance of 0.5% for in transit losses. (App. 6-10). Carrier appeals from the court's determinations concerning liability and custom.

Although finding in Consignee's favor on liability, the District Court restricted Consignee's recovery in three respects. First, the District Court held, as a matter of law, that Consignee could not compute the cargo shortage on the basis of measurements taken in shore tanks at Rotterdam after the cargo had left the Vessel. Second, it held that Consignee was not permitted to recover damages for the cost of carrying replacement cargo to Rotterdam. Third, it held that Consignee could not recover for the lost

cargo based on the prices it actually paid for this cargo. Consignee cross-appeals from those portions of the District Court's decision which restricted its damages.

POINT I

THE FINDING OF THE DISTRICT COURT
THAT THE CARRIER HAD MADE A SHORT
DELIVERY OF 516 L/T OF CRUDE OIL
WAS NOT "CLEARLY ERRONEOUS"

The District Court found that the Vessel made a short delivery of 516 gross L/T of crude oil, as measured by the difference between the quantity determined on the basis of the Vessel's ullages at Bonny and the quantity determined on the basis of its ullages at Rotterdam. (App. 5,6). Rule 52(a) of the Federal Rules of Civil Procedure provides that such findings of fact shall not be set aside unless "clearly erroneous". As the United States Supreme Court stated in United States v. United States Gypsum Co., 333 U.S. 364, 394-395 (1948):

"That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of

the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

As Judge Medina stated in M.W. Zack Metal Co. v. SS Birmingham City, 311 F.2d 334, 337-338 (2d Cir. 1962), affirming the Trial Court's decree dismissing the libel:

"While this is a case in admiralty, the 'clearly erroneous' principle embodied in Federal Rule of Civil Procedure 52(a) is applicable. McAllister v. United States, 1954, 348 U.S. 19, 20, 75 S.Ct. 6, 99 L.Ed. 20. A fair statement of the rule is that we may not set aside a finding of fact unless we are left with the "definite and firm conviction that a mistake has been committed,"

United States v. United States Gypsum Co., 1948, 333 U.S. 364, 395, 68 S.Ct. 525, 542. 92 L. Ed. 746, and that we will reverse 'most reluctantly and only when well persuaded'. United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 433 *** What this comes down to in substance is that we must take a good, hard look at the record as a whole, and when all is said and done, given the unavoidable division of function between a trial and an appellate court, we should only reverse when fairly well persuaded."

In the present case, the comparison of the Vessel's ullages at loading and discharging ports demonstrated a loss of 516 gross long tons of crude oil during the time period between completion of loading on the Vessel at Bonny and commencement of discharging at Rotterdam, as the Court found. (App. 5, 6) Carrier did not call any of the Vessel's officers or crew as witnesses and offered no explanation of the loss even though the Vessel's own ullages showed that cargo had been transferred within the Vessel during the voyage (App. 51-53) and that there had been decreases in the volume of cargo in the Vessel's tanks which were greater than could be explained by changes in the temperature of the cargo. (App. 56 - 59) Absent any other explanation, it is fair to assume that the loss occurred as a result of leakages from the Vessel through cracks in the hull and piping and/or leaky valves either

while the crude oil was being transported in the Vessel's cargo tanks or transferred by the Vessel from tank to tank during the voyage.

Such cracks and leaky valves might also admit water into the Vessel and indeed the Verwey report showed that there was a substantial increase in the BS&W content of the cargo during the voyage. According to the Verwey report the BS&W content of the Light Crude increased during the voyage from .25% at Bonny (App. Ex.13) to .40% at Rotterdam (App. Ex.26) and the BS&W content of the Medium Crude increased from between .1% and .15% at Bonny (App. Ex.14) to 1.5% at Rotterdam.(App. Ex.33) Again Carrier offered no explanation for this change during the voyage or the presence of "free water" in the cargo tanks at Rotterdam.

Carrier argued below, as it does before this Court, that the amount of cargo delivered by the Vessel should be measured by comparing unlike quantities, that is, comparing quantities determined from Vessel's ullages at Rotterdam with quantities determined from shore ullages at Bonny. (Carrier's Brief pp.10-11) This argument is illogical on its face (being essentially a comparison of "apples" with "oranges") and was correctly rejected by the District Court. (App. 7)

The evidence before the District Court demonstrated conclusively that the Vessel's tanks were not accurately calibrated. Although Carrier admitted that the quantities shown on the bill of lading had been delivered to the Vessel, (App. 12-13) the quantities determined from the Vessel's ullages, taken after completion of loading at Bonny, were 480 L/T greater than the bill of lading quantities. (see pp. 6-7 supra) Thus any comparison of Vessel's ullage quantities with shore tank quantities was necessarily distorted in Carrier's favor by 480 L/T. (App.7)

Further, gross quantities such as Carrier wishes to compare are not relevant in calculating the cargo shortage. Consignee paid for the crude oil on the basis of net quantities shown on the bill of lading. (App. Ex.17) That is, Consignee bought a quantity of "dry oil", not oil with sediment and water. (App. 48) Thus any comparison of gross quantities shown on the bill of lading with gross quantities determined from the Vessel's ullages at Rotterdam is distorted in Carrier's favor by the amount of increased BS&W content of the cargo which, of course, is not reflected in the Vessel's Rotterdam ullage quantities.

Carrier attacks the District Court's comparison of quantities based on the Bonny and the Rotterdam ullages, contending that use of the Bonny ullages to measure the loss is tantamount to impeaching the accuracy of the bill

of lading quantities. (Carrier's Brief, pp.8-10) This argument is specious. Both parties accepted the bill of lading quantities as having been loaded on the Vessel and the District Court did not indicate any doubt about the accuracy of the bill of lading. Rather it is evident that the District Court used the Bonny ullage-based quantities because they were similar in origin to the Rotterdam ullage-based measurements which the Court concluded (we think erroneously - see Point III infra) were the proper measurement of what Carrier delivered at Rotterdam. That is, the Court compared like rather than unlike quantities, thus avoiding the 480 L/T difference between Vessel's and shore's measurements of the cargo.

Carrier's reliance on Venesta, Ltd. v. Walford Lines, Ltd., [1922] 12 Lloyd's List L.R. 139, is misplaced as well as facetious. In the first place, the rule that a carrier is estopped from denying the correctness of quantities listed on a bill of lading is designed for the protection of consignees and others in commerce who buy bills of lading fully expecting that they have purchased the full quantity of goods described on the bill of lading. The rationale behind the rule is that the carrier has the opportunity to accurately describe the goods on the bill of lading and that he should therefore be responsible for

accurately doing so. As stated in 1 Carver, Carriage by Sea, (12 ed. 1971) § 75 p. 64 (the very section cited by Carrier):

"A shipowner is bound to deliver the full amount of goods signed for by the master in the bill of lading, unless he can prove that the whole or some part of it was in fact not shipped by very satisfactory evidence."

(emphasis added)

Second, the estoppel theory is designed to protect a consignee or purchaser of a bill of lading who has actually relied on the descriptions made by the carrier in the bill of lading. As this Court said in Freedman v. The M/S Concordia Star, 250 F.2d 867, 869 (2d Cir. 1958):

"An estoppel in pais operates in favor of a person who has been misled; and the party invoking the principle of estoppel has the burden of proving that he has acted to his detriment in reliance upon what the other party had done. The appellant contends that the libelants failed to prove that they suffered any detriment in reliance on the duplicate bills of lading. We agree."

There is no reason for the theory to be applied in the present case.

Carrier further contends that, if the District Court was correct in finding the Vessel's tanks were over-calibrated, Consignee has not established any shortage.

(Carrier's Brief pp.11-12) Clearly the thrust of the District Court's finding concerning the 480 L/T difference between the Vessel's quantities and the bill of lading's quantities was that it was not proper to compare the shore figures with the Vessel's figures. The Court's comparison of the Vessel's figures at Bonny and Rotterdam, however, eliminated the 480 L/T difference and indicated a 516 L/T shortage based on the evidence of the Vessel's own measurements and records. Thus the shortage was indeed established conclusively, albeit in terms of a gross tonnage comparison rather than a net tonnage comparison. As described more fully in Point III infra, Consignee submits that the true measure of Consignee's loss should have been a comparison of net bill of lading quantities with net Rotterdam shore tank quantities.

Finally Carrier's reference to the Dry Tank Certificate (App. Ex.43 - see Carrier's Brief pp.11-12) adds nothing to its argument. That certificate merely shows that at Rotterdam everything contained in the Vessel's tanks was drained out to the inspector's satisfaction. It is not evidence that the cargo had not leaked out earlier. The Vessel's ullage quantities, indicating a loss of 516 L/T during the voyage, stand as conclusive evidence of a

loss of at least that much crude oil. Accordingly, we respectfully submit that this Court should affirm the District Court's finding that Carrier made a short delivery of 516 long tons of crude oil as not "clearly erroneous", subject to modification of the quantity of the shortage as requested by Consignee's cross appeal.

POINT II

THE DISTRICT COURT DID NOT ERR IN REJECTING
CARRIER'S CONTENTIONS CONCERNING THE ASSERTED
"CUSTOM" IN THE TRADE FOR A CARRIER TO BE GIVEN
A 0.5% ALLOWANCE FOR LOSS OF CARGO IN TRANSIT

The District Court rejected Carrier's contentions concerning an asserted "custom" in the trade for a carrier to be given a 0.5% allowance for loss of cargo in transit, stating:

"*** Neither the bill of lading nor the charter party makes reference to any such allowance, and defendants have cited no authority supporting its applicability in litigated cargo shortage cases. The fact that an allowance may be used in settlements of cargo disputes does not entail that it should be treated as a rule of law."

Carrier concedes that the question of whether such a custom exists is a question of fact. (Carrier's Brief,

p.15; see App. 103-104) We respectfully submit that Carrier did not prove the existence of any such "custom" and that the refusal of the Court to accept the asserted "custom" was not "clearly erroneous".

Essentially Carrier sought, by asserting a "custom" in the trade, to add an unwritten term to its bill of lading contract with Consignee. The basis for such an addition would be the presumption that, in commercial transactions of this type, the parties did not mean to express in writing the whole of their contract but intended to contract with reference to known usages of the trade. See 1 Carver, Carriage by Sea, §551 p.476 This treatise further states:

"When a practice has come to be constantly followed by all those engaged in a trade, and is such that its existence is well known among them, it becomes unnecessary in contracting to insert expressly the condition or rule which it established. That is adopted tacitly, and taken for granted, as one of the data of the transaction. And if on the particular occasion it were intended not to follow it, that intention would naturally be expressly in the contract.

Such customs must clearly be distinguished from mere trade practices such as those considered above. A shipowner or charterer is entitled to perform the contract in any usual manner - according to ordinary trade practice; he is bound to perform it accord-

ing to custom. In the mind of a layman there is often a confusion between custom and that which is customarily done, and he wrongly imagines that this latter amounts to a legal custom.

A uniform practice of this kind is called a custom of the trade; and where such a custom prevails, it is presumed that a contract made by persons in that trade was intended to incorporate it, unless the contract has either expressly excluded it, or contains terms with which the custom is not consistent, and so has excluded it by implication. The custom overrides the rule of law which would otherwise apply, just as an expressed term of a contract supersedes the term which the law would otherwise have implied. But the custom is not law; it depends for its operation upon contract. So that unless the circumstances under which the contract was made were such that a knowledge of the custom, and an intention to incorporate it, can properly be assumed, the custom ought not to qualify, or add to the effect of the contract, as interpreted by the law."

1 Carver, Carriage by Sea,
§551-552 pp.476-477
(treatise's emphasis)

Since the legal effect of a custom of the trade is to supplement the parties' written contract, the law requires that the party asserting a custom must establish that the asserted custom is definite and uniformly adopted. Carver states the rule as follows:

"That a custom of trade may have the effect of annexing a qualifying or independent term to a contract it must be definite, and

uniformly adopted. There must be no uncertainty as to what it is; and it must have been followed, in that shape, and as a regular thing, in transactions of that particular kind, by all persons habitually engaged in that trade, or branch of the trade. For if the custom is not definite it is not possible to say with certainty what the term is which is to be incorporated in the contract. And if it has not been uniformly adopted, it cannot confidently be presumed that it was adopted, on the particular occasion."

1 Carver, Carriage by Sea,
§556, p.479
(emphasis added)

The rule is the same in the United States. Anglo-Saxon Petroleum Co. v. United States, 222 F.2d 75, 77 (2d Cir. 1955); Parkway Baking Co. v. Freihoffer Baking Co., 255 F.2d 641, 647 (3d Cir. 1958); General Motors Corp. v. Pennsylvania R.R. Co., 357 F.Supp. 646, 653 (SDNY 1973).

Carrier's evidence concerning the asserted "custom" of a 0.5% allowance for in transit loss completely failed to meet either the requirement of definiteness or uniformity. Carrier's evidence consisted entirely of the testimony of its own representative, Mr. Nichols, a former P&I Club claims adjuster. (App. 106-110) Mr. Nichols testified concerning his experience in settling claims for liability underwriters and described the application of a 0.5%

"allowance" in settling claims for shortage of petroleum products. (App. 107-108) He acknowledged that

"The industry has never approved any percentage for a shortage per se".

(App. 115)

Further, he acknowledged that any such allowance for cargo shortage had to be agreed upon between the parties to the settlement; such an agreement was for the purpose of avoiding litigation. (App. 124)

In addition, Carrier asserted that arbitrators had applied the asserted 0.5% allowance in awards relating to petroleum shortage claims. (App. 120-121) Mr. Nichols himself had acted as an arbitrator but evidently had never had any opportunity to apply such an allowance; indeed he acknowledged that "***cargo claims under bills of lading are a matter usually litigated rather than arbitrated". (App. 111)

The District Court advised Carrier at the start of its case that the Court would not readily accept the assertion that an ocean carrier was entitled by "custom" to lose one half barrel of every 100 barrels of oil loaded. (App. 103) However, Carrier failed to produce any evidence in addition to that given by Mr. Nichols. While the explanation for

the loss in transit was described as "evaporation", (App. 115) Carrier presented no scientific or technical evidence confirming any evaporation by crude oil.

Carrier has pointed to the correspondence between the parties as indicating Consignee's knowledge and use of a 0.5% allowance. (see Carrier's Brief pp.15-17) However, while Consignee might have been willing to make such an allowance part of a settlement of its shortage claim in order to avoid the expense of litigation, no settlement was ever reached and the expenses of litigation have been incurred. It is anomalous for Carrier now to contend that it might still be entitled to any such settlement allowance.

In addition Carrier has referred this Court to several arbitration awards in which the arbitrators applied a 0.5% allowance in making their awards. (Carrier's Brief pp.17-22) Such awards are in no sense binding on this or any court and have no value as precedent, for it has long been recognized that commercial arbitration, a process to which both parties must agree in writing, is merely an expeditious manner of settling claims. See Cargo Carriers Inc. v. Erie & St. Lawrence Corp., 105 F.Supp.638, 639 (WDNY 1952); Graham v. Acme Markets, Inc., 299 F. Supp. 1304 (EDPa.1969).

Thus the circumstance that arbitrators may apply an allowance in making their awards is no more indicative of custom than the use of an allowance by parties in settling disputes.

Carrier cites the cases of Skidmore v. Swift & Co., 323 U.S. 134 (1944) and Sonken-Galamba Corp. v. Thompson, 225 F.2d 608 (10th Cir.) cert. den. 350 U.S. 896 (1955) to support the proposition that this Court should look to arbitration awards for guidance on the existence of a custom of the trade. (Carrier's Brief p.20) Neither of these cases involved a court accepting from an inferior tribunal a decision that some practice is a "custom" of the trade entitled to the force of law. In Skidmore, supra, the issue before the Supreme Court was whether certain time spent by employees staying "in the fire house on the Company premises, or within hailing distance" was "employment" within the meaning of The Fair Labor Standards Act and the Court approved reference to an interpretative bulletin issued by the Administrator of that Act. Similarly, in Sonken-Galamba Corp., supra, the issue was whether wrecked aluminum airplane parts were subject to the freight rate under a tariff for "scrap aluminum" or "aluminum ingots, pigs or slabs" and the court approved reference to decisions of the

Interstate Commerce Commission concerning these tariff classifications. Consequently, in both of these cases, the courts were merely drawing upon the definitions made by specially constituted administrative bodies of certain ambiguous terms which were part of a statute or tariff. Arbitrators appointed by particular parties to settle particular contractual disputes are in no way equivalent to administrative agencies of the United States government nor are their awards deserving of similar recognition.

The District Court specifically noted that neither the bill of lading (App. Ex.15-16) nor the affreightment contract (App. Ex.47-61) made any reference to the asserted allowance. (App. 9) In fact such an allowance would not be permissible under any of the statutes relating to carriage of goods by sea which have been adopted by the maritime nations. Article III §8 of the International Convention for the Unification of Certain Rules Relating to Bills of Lading dated Brussels August 1924, as amended ("Hague Rules")* specifically prohibits any bill of lading

*Nigeria, the country in which the Vessel loaded the crude oil, adopted the Hague Rules by ordinance in 1926, which became Ch.29 of the Laws of the Federation of Nigeria. 2 Carver, op cit supra §1632 p.1330 (see bill of lading, Clause 2 - App. Ex.15) Both the Carriage of Goods by Sea Act, 1924, of the United Kingdom and the United States Carriage of Goods by Sea Act, 1936 conform in all material respects to the Hague Rules. Gilmore & Black, Admiralty (2d ed 1975) 143-144.

agreement lessening the carrier's obligations under the Rules, stating:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect."

2 Carver, Carriage by Sea,
§1592 p. 1304
(see COGSA §3(8), 46 U.S.
Code §1303(8))

For a carrier to be relieved by "custom" of liability for a portion of a cargo loss without having been required to prove that the loss was unavoidable or not resulting from negligence, fault or failure of the carrier would be exactly the sort of "lessening" of liability prohibited by the Rules.

For all of the reasons indicated above, we respectfully submit that the District Court did not err in rejecting Carrier's contentions concerning the asserted "custom" of a 0.5% allowance for in transit loss.

POINT III

THE DISTRICT COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE EXTENT OF THE CARGO SHORTAGE COULD NOT BE CALCULATED BY USE OF SHORE TANK MEASUREMENTS TAKEN UPON COMPLETION OF DISCHARGE

The District Court correctly found that a shortage of cargo occurred during the voyage for which Carrier was liable, (App. 5,6) but the Court limited Consignee's recovery to 516 gross L/T, which was the difference between the total quantity of crude oil in the Vessel's cargo tanks on the basis of the Vessel's ullages at the port of loading and the total quantity of liquid in the Vessel's tanks based on the ullages at the port of discharge. (see App. Ex.18, 19; App.5) This measurement of the loss fails to take into account Consignee's evidence that much more than 516 tons of cargo was lost from the Vessel and partially replaced by water. It is a measure only of the difference in the total quantity of liquid in the Vessel's cargo tanks at the loading port as compared with the total liquid in the tanks at the port of discharge.

A true measure of a loss of oil in transportation can only be made on the basis of "net" quantities, that is, quantities which have been adjusted for any changes in water content of the oil during transit. The "net"

quantities here were determined from shore tank measurements adjusted for water content after analysis of samples. (App. 16-18; 84) However, the District Court refused to consider the evidence which established the greater loss of 810 L/T based on the "net" quantities of cargo delivered to shore tanks at the port of discharge as adjusted by the 200 tons of slops. This refusal of the Court was based on the erroneous conclusion that measurements of the cargo made after delivery from the Vessel cannot be used to calculate the quantity discharged. The District Court stated:

"Specifically, plaintiff has urged that the loss of cargo be calculated by comparing the net figures on the bill of lading with the net figures contained in Dr. Verwey's survey of the Chevron storage tanks in Rotterdam. Acceptance of these figures would yield a shortage of 810 L/T after allowance is made for the 200 L/T of slops. The difficulty with this method is that it depends on a measurement of the cargo taken after it had passed out of the custody of the carrier. As plaintiff's own witness testified under questioning by the court, Esso Nederland generally takes charge of the oil when it crosses the flange at the discharge port, which in this case would have been before the oil was pumped into the storage tanks surveyed by Dr. Verwey. If, as the court now holds, defendants' responsibility for the cargo ceased at the time of delivery, reliance on measure-

ments taken after that time to establish a shortage is unjustified. Cf. Centerchem Products v. A/S Rederiet Odfjell, 1972 AMC 373 (EDVa.1971)".

(App. 6-7)

The measurement of loss or damage in virtually all cargo cases is made by looking to surveys or measurements taken after the cargo has been discharged from a vessel. This is so because there generally is no way of determining loss or damage at the split second that the cargo moves over the vessel's side or leaves the vessel's tackle or pipelines. Of course, the shore-side measurements must be shown by evidence to be a reasonably accurate measure of the quantity discharged. This is accomplished by evidence that there was no loss between discharge and the time and place where the measurements were made. Consignee offered such proof here (App.19) and it was not rebutted.

In recognition of the practical problems involved in determining cargo loss or damage at the moment the cargo leaves the carrying vessel, the Hague Rules and the statutes enacting these Rules specifically provide that where loss or damage is not apparent "at the time of the removal of the goods into the custody of the person entitled to delivery", then the person entitled to delivery

shall give the carrier some notice of the loss or damage within three days after delivery. 2 Carver, Carriage by Sea, §1591, p. 1303. The penalty for failure to provide timely notice of loss or damage is merely that a court may draw a rebuttable inference that no loss or damage occurred to the cargo while it was in the hands of the carrier. See Knauth, Ocean Bills of Lading (1953) 273-274. However, the cargo owner may introduce post-delivery evidence of damage or loss to prove a loss or damage at the time of delivery and thus rebut this inference. See Interstate Steel Corp. v. SS Crystal Gem, 317 F.Supp. 112, 116 (SDNY 1970) (proof of damage taken from an inspection subsequent to the discharge of cargo); Swedish American Line v. Evans Products Co., 431 F.2d 869 (4th Cir. 1970) (final ascertainment of damages in Illinois used as evidence to establish the "similar" bad condition of the cargo upon outturn at the port of discharge in Norfolk, Virginia).

In the present case, an immediate protest of the loss was made by Verwey on behalf of Consignee at the port of discharge on the basis of the Vessel's quantities for the Medium Crude. (App. Ex.44) However, the full amount of the shortage, which depended on analysis of samples to

determine BS&W, (see App. Ex. 26, 33) was not known until four days later when the Verwey report was issued. (App. Ex. 20-38)

The case of Centerchem Products v. A/S Rederi Odfjell, 1972 AMC 373 (EDVa. 1971) (not officially reported) has been previously cited by Carrier and was cited by the District Court to show that shore tank gaugings at the port of discharge may not be used to establish the amount of damages for which a carrier will be held liable. In that case the comparison of the vessel's ullages at the port of loading and discharging indicated there had not been a shortage of cargo, quite unlike the present case. While the shore tank measurements in Centerchem did show a shortage, the court was reluctant to rely on the shore measurements for the reason that the flexible hose pipe supplied by the consignee's agent had burst during the discharging operations. Consequently, a "considerable volume" of cargo was lost which could not be accurately measured, (see 1972 AMC at 374) thereby leading the court to conclude that "*** it is entirely likely that all of the lost glyoxal occurred at this point, off the ship and in plaintiff's agent's hands". 1972 AMC at 376 Thus, in Centerchem there was evidence of loss of cargo after

discharge and in this special circumstance the court had reason for refusing to rely on the shore tank measurements to establish the quantity of cargo discharged from the vessel. There is no such evidence in the present case. On the contrary, the uncontradicted evidence is that there was an in transit loss (as confirmed by the Vessel's ullages) and there was no post-delivery loss (as confirmed by Mr. Van Krimpen).

Indeed, in this case there is a further factual reason why the court below erred in not permitting Consignee to compute its loss based on a comparison of the net tonnages listed on the bill of lading and the net tonnages listed on the Verwey report. As previously described at page 16 of this Brief, the water content of the crude oil cargo increased substantially during the voyage from Bonny to Rotterdam, thereby diluting the quantity of "dry oil" which Consignee purchased. Consequently, Consignee's loss, if limited to the difference between gross ullage quantities at the loading and discharging ports, is substantially understated because the ullage quantity at the discharging port included a greatly increased BS&W factor. (compare water and sediment figures shown on the Bonny certificates of quality - App. Ex. 13, 14 - with the Verwey analysis certificates - App. Ex. 26, 33) Only by comparing net cargo

quantities, which exclude BS&W and show the amount of "dry oil" delivered, can one accurately measure the loss of cargo.

Accordingly, we respectfully submit that the District Court erred in holding as a matter of law that Consignee could not compute its loss by reference to shore tank figures at Rotterdam. As the District Court found that the Vessel's cargo measured 60,259 net L/T in the shore tanks including the 200 gross L/T of slops (App. 5-6) and as Carrier admitted that a total of 60,869 net L/T was delivered to the Vessel (App. 12-13), all of the pertinent facts for determining Consignee's loss on the basis of net quantities are in the record. Accordingly, we respectfully submit that this Court, in addition to affirming the judgment with respect to the Vessel's and Carrier's liability for the reasons given in Points I and II of this Brief, should modify the judgment below to allow Consignee recovery for a loss of 610 net L/T of crude oil (the difference between the bill of lading quantities and the Rotterdam shore tank quantities)*.

* In view of the inconclusive evidence concerning the oil content of "slops" Consignee does not claim on this appeal for any additional allowance for the 200 tons of slops discharged with the cargo at Rotterdam.

POINT IV

THE DISTRICT COURT ERRED, IN ITS DETERMINATION
OF DAMAGES, IN FAILING TO INCLUDE AS AN ELEMENT
OF DAMAGES THE COST OF TRANSPORTING A REPLACE-
MENT CARGO TO THE PORT OF DISCHARGE

The District Court specifically held that Consignee was not entitled to recover the cost of transporting a replacement cargo to the port of discharge, stating:

"Compensation for freight on the lost cargo is not included because the evidence does not establish that any payment for freight was ever made to the defendants."

(App.8-9; emphasis added)

It is respectfully submitted that in reaching this conclusion the District Court misunderstood both the facts of this case and the law applicable to cargo loss under maritime law.

At the time of the voyage from Bonny to Rotterdam, the Vessel, as the District Court found, (App. 4) was operating under a time charter to Standard Tankers (Bahamas) Company, Ltd. ("STB") as charterer. Under a time charter party the vessel owner is compensated by the charterer's payment of charter hire on a regular basis without regard to the particular cargo being carried, while

it is the charterer's duty to employ the vessel and earn freight from its carriage of cargo. See generally Gilmore & Black Admiralty, 229-231. Carrier, as owner of the Vessel, had no right to freight for carriage of the crude oil here involved absent any default by STB in paying hire under the time charter; no such default ever existed or indeed was ever claimed to exist.

STB, as chartered owner of the Vessel, was the "carrier" of Consignee's crude oil pursuant to the Inter-Affiliate Blanket Charter Agreement. (App. Ex. 47-61; see pages 11-12, supra) As a result, freight for the crude oil was payable to STB, as the employer of the Vessel, not to Carrier or to the Vessel. The rate of freight was \$9.428 per long ton of cargo "computed on intake quantity". (App. Ex. 39, 46, 59) Thus Consignee was obliged to pay freight even though there was a shortage on delivery at Rotterdam.

Generally, the measure of damages for loss of goods by a carrier is their value at the destination to which it undertook to carry them. St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial do Rio de Janeiro, 263 U.S. 119 (1923) Where no market exists at destination the carrier's liability is usually computed on the basis of the

market value of the cargo at the port of shipment plus such items as will result in a total which fairly represents the market value at destination. Longley, Common Carriage of Cargo, (1967) §18.02 p.208; Northern Commercial Co. v. Lindblom, 162 F. 250 (9th Cir. 1908); "In the absence of evidence of the market value of the goods at the place of destination, it will be presumed they would have been worth as much there as at the place of shipment with the cost of carriage added". The Arctic Bird, 109 F. 167, 175 (ND Cal. 1901); see also The Hugo, 61 F. 860 (SDNY 1894); 2 Carver Carriage by Sea, §1458 pp. 1227-1228.

Carrier itself placed Consignee's initial statement of its loss into evidence. (App. Ex. 45-46) This statement described the loss in terms of "C and F Value in U.S. dollars of the shortweight", with the freight per long ton of shortage being stated as the product of \$4.75 (the base rate for the voyage per long ton of cargo carried) and the applicable market rate of 198.5 or \$9.428 per long ton. (see also App. Ex. 39)

Carrier might have argued that the statements of Consignee's loss of the purchase price and the freight on the short delivered quantity of crude oil in these

exhibits were incompetent and inadmissible as hearsay. However, this evidence was received without objection by Carrier. As a result it is entitled to consideration as substantive evidence of the facts asserted therein and should be given its natural probative effect. Diaz v. United States, 223 U.S. 442, 450 (1912); Calmar S.S. Corp. v. Scott, 197 F.2d 795, 798 (2d Cir. 1952); Continental Oil Co. v. United States, 184 F. 2d 802, 813 (9th Cir. 1950). This is particularly so with respect to Consignee's original statement of its loss (App. Ex. 45-46) since Carrier itself presented the document in evidence.

There was never any question at trial as to the actual cost of transportation for this cargo of crude oil or that this was a reasonable cost for transporting a replacement cargo to destination. Carrier never sought to challenge the propriety of the freight charge asserted. There is therefore no basis for the District Court's denial of transportation cost for a replacement cargo as an element of Consignee's damages.

Accordingly, we respectfully submit that this Court, in addition to affirming the judgment with respect to the Vessel's and Carrier's liability, should modify the judgment below to allow Consignee recovery for its transportation cost for a replacement cargo at the rate of \$9.428 per long ton of the shortage.

POINT V

THE DISTRICT COURT ERRED, IN ITS DETERMINATION OF DAMAGES, IN PRESUMING, IN THE ABSENCE OF ANY EVIDENCE, THAT THE ACTUAL PRICE PAID BY CONSIGNEE TO ITS AFFILIATE FOR THE CRUDE OIL WAS AN UNRELIABLE MEASURE OF ITS ACTUAL VALUE

In proving its damages in the District Court, Consignee, mindful of the rule of Illinois Central R. Co. v. Crail, 281 U.S. 57 (1930) that a dealer in products is entitled to recover damages based on the wholesale replacement cost of the product rather than the retail replacement cost, made no attempt to prove the retail market value of the short delivered quantity of crude oil at Rotterdam as of February 1974 when it should have arrived there.* Rather, Consignee proved the Supply Agreement with EIC (App. Ex. 1-12) pursuant to which it had purchased the crude oil and its payment to EIC of \$10.658 per barrel for the Light Crude and \$10.321 per barrel for the Medium Crude (App. Ex. 17, App. 23, 61-62) to establish the wholesale replacement cost of the crude oil.

Carrier did not submit any evidence concerning the market value of the crude oil or rebut Consignee's evidence

* The Netherlands was one of the principal targets of the Arab oil embargo declared the previous autumn and retail prices at Rotterdam had risen sharply as a result.

of its payment to EIC. However, the District Court refused to consider the prices actually paid by Consignee for the crude oil in computing Consignee's damages for the short delivery. (App. 8) Instead, the District Court looked to the prices which EIC had paid to its seller, BP Trading Limited, which were \$9.14 per barrel for the Light Nigerian crude oil and \$10.09* per barrel for the Medium Nigerian crude oil. (App. 101, 126-127)

In rejecting the slightly higher prices paid by Consignee to EIC as a measure of its damages, the District Court stated:

"In arriving at this figure, [the court's damage calculation] the court has considered the prices charged Exxon International by B.P. Trading Ltd. for the cargo in an arm's length transaction to be a more reliable measurement of its actual value than the prices Exxon International charged its corporate affiliate, Esso Nederland."

(App. 8)

There was absolutely no evidence that the transaction between Consignee and EIC was anything other than an arm's length transaction which would produce an equally reliable

* The District Court erroneously stated the price as \$10.06. (App. 8) As there was no contrary evidence, we respectfully submit that this was a typographical error.

source of market value of the crude oil. Thus the District Court's decision to treat the Consignee-EIC transaction as suspect can only be explained by the court's having inferred or presumed that any inter-affiliate transaction was suspect. We respectfully submit that the District Court erred in presuming, in the absence of any evidence, that the price charged by one corporate affiliate to another for a cargo of crude oil was unreliable evidence of its market value.

It is possible that the District Court inferred that the inter-affiliate transaction was suspect because of some private conviction on the part of the trial judge. However, "Inferences may be drawn only from facts introduced in evidence. They may not be based upon mere speculation, guess, or conjecture", Waters v. National Life & Accident Ins. Co., 156 F.2d 470, 472-473 (10th Cir. 1946). "Inferences must be based upon proof and not upon unwarranted assumptions", Schindley v. Allen-Shermanhoff Co., 157 F.2d 102, 104 (6th Cir. 1946). Because there was no evidence indicating the inter-affiliate transaction was suspect, the trier of fact was not free to draw such an inference from his own assumptions or predilections.

In a civil case, a court may not presume one fact from another fact unless to do so is not "unreasonable or arbitrary", Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929). "Presumptions of fact which the law recognizes must be immediate inferences from the facts proved and must be such as sensible men influenced by observation, experience and reason, would draw from clearly established facts", Socony-Vacuum Oil Co. v. Oil City Refiners, Inc., 136 F.2d 470, 474 (6th Cir.), cert. denied, 320 U.S. 798 (1943). "It is generally understood that in law for a specified fact to be presumptive evidence of another it must be one which in common experience leads naturally and logically to that other", Wilkins v. American Export Isbrandtsen Lines, Inc., 446 F.2d 480, 484 (2d Cir. 1971) cert. denied 404 U.S. 1018, rehearing denied 405 U.S. 969 (1972). It can hardly be said that as a matter of common experience, one may reasonably and logically conclude that a sale between two corporate affiliates will be made at an inflated price.

Not only did the District Court err in inferring or presuming that the inter-affiliate transaction was suspect, the court also erred in not presuming or inferring that this transaction was perfectly proper. "Among the obvious presumptions which govern a trial court are *** that

private transactions have been fair and regular, that the ordinary course of business has been followed ***", United States v. Kansas Gas and Electric Co., 215 F.Supp. 532, 542 (DC Kan. 1963). A "basic presumption is that, until outweighed by evidence in the case to the contrary, the fact finder may find and conclude that private transactions have been fair and regular ***", United States v. One 1971 Ford Truck, 346 F. Supp. 613, 620 (CD Cal. 1972). "Absent evidence to the contrary, the applicable presumption is that the ordinary course of business was followed ***", United States v. Washington, 233 F.2d 811, 816 (9th Cir. 1956). "Entering into business undertakings, parties do not intend to over-reach each other, but rather mean to make equitable and conscionable agreements", Flax v. Prudential Life Ins. Co., 148 F. Supp. 720, 730 (SD Cal. 1957). A court is "bound to take the presumption or the inference, at least, that all business transactions had are bona fide and in due course," Fianza Cia Nav. S.A. v. Benz, 178 F.Supp. 243, 246 (DC Or. 1958).

The District Court found that Consignee paid EIC at the rate of \$10.321 per barrel for the Medium Crude and \$10.658 per barrel for the Light Crude. (App. 4) Accordingly, we respectfully submit that this Court, in addition to affirming the judgment with respect to the Vessel's

and Carrier's liability for the cargo shortage, should modify the judgment below to allow Consignee recovery on the basis of the prices actually paid to EIC.

FINAL POINT

For all of the foregoing reasons, we respectfully submit that this Court should affirm the judgment of the District Court that the Vessel and Carrier are liable for short delivery of a quantity of crude oil and should direct modification of the judgment to provide that Consignee should have recovery for a shortage of 610 net L/T of crude oil at the prices actually paid by Consignee together with transportation cost at the rate of \$9.428 per L/T.

Dated: New York, New York
May 6, 1977

Respectfully submitted,

KIRLIN, CAMPBELL & KEATING
Attorneys for Appellee-
Cross-Appellant Esso Nederland b.v.

David A. Nourse
Armand Maurice Paré, Jr.
Of Counsel

Docket 77-7075

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that two (2) copies of the attached
brief were this date served by mail on the following:

CARDILLO & CORBETT
Attorneys for Defendants-Appellants-
Cross-Appellee
29 Broadway
New York, NY 10006

Dated: New York, New York

May 6, 1977

KIRLIN, CAMPBELL & KEATING
Attorneys for Plaintiff-
Appellee-Cross-Appellant

By Charles H. Keating